REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO	
(2)	OF INTEREST TO OTHER JUDGES: YES	
(3)	REVISED: YES	
[redacted]		07/08/2024
………………………		………………………
SIGNATURE		DATE

CASE NO: 277/2018

In the matter between:

IZINGWENYA 210 INVESTMENTS CC First Plaintiff

JUSLO SECURITY SERVICES CC Second Plaintiff

and

BUSHBUCKRIDGE LOCAL MUNICIPALITY Defendant

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 07 August 2024 at 10:00.

JUDGMENT

MASHILE J:

INTRODUCTION

[1] Following an award of a tender bid to the Plaintiffs ("the JV"), the Defendant ("the Municipality") appointed the JV. The letter of appointment stipulates that the Municipality and the JV ("The Parties") are required to conclude a service level agreement ("SLA"). Pursuant to the letter of appointment, the parties entered into the SLA on 9 December 2013. Notwithstanding that the agreement was concluded on 9 December 2013, it was deemed to have commenced on 1 December 2013. On 18 March 2014, the Municipality called a meeting of the parties to advise the JV that it had been placed under administration.

[2] The administration status of the Municipality implied that it had to adopt austerity measures to ameliorate its poor financial position. Still on that day, the Municipality informed the JV that it was intending to reduce the number of security guards to be posted to manage the amount that it was paying to the JV. The parties then agreed that the JV would reduce the overall number of security guards posted to sixty. After the revision of the number of security guards to be posted, the JV alleges that the Municipality unilaterally cut the rates per guard posted but undertook to revert to the agreed rates during the next cycle, which it never did.

[3] On 20 January 2018 the JV instituted this contractual damages action. It did so believing that the unilateral revision of the amount payable per guard constituted repudiation of the SLA. The Municipality is defending this action and has delivered a special plea based on prescription. If the JV survives the special plea of prescription, it argues that the particulars of claim neither make a case for repudiation nor breach

consequently it stands to be dismissed or that an absolution from the instance should be granted.

FACTUAL MATRIX

[4] Despite that this Court could have determined the special plea and either dismissed or upheld it, I directed that it would be cost effective and time saving for the parties to proceed to address the Court on merits in case I became inclined to dismiss the prescription argument instead of having to obtain yet another date to address merits. Below I describe a terse background of the facts against which this matter ought to be considered. The JV was specifically founded for purposes of acting as the service provider of the Municipality providing security of the premises, property, personnel and clients of the Municipality. After being awarded the tender bid, the parties concluded the SLA on 9 December 2013.

[5] Although the agreement was concluded on the aforesaid date, the parties deemed the agreement to have commenced on 1 December 2013 culminating on 30 November 2016. The parties agreed further that the Municipality would pay the JV a total fee of **R504 971.20** per month calculated at a rate of **R7 858.40** per Grade C armed guards and at **R7 258.40** for forty-five grade D/E unarmed guards. At a meeting of the parties on 18 March 2014, the parties concluded that due to the poor economic outlook of the Municipality, the JV would reduce the number of posted security guards to sixty. The Municipality then unilaterally proceeded to revise the rate to:

5.1 **R7 858.40** to **R6 500.00** reckoned from June 2014 to December 2015 per Grade C guards;

5.2 **R7858.40** to **R6 955.00** to be reduced later in January 2016 to July 2017.

[6] On the same date, the Municipality unilaterally reduced the Grade D/E guards rate as follows: from **R7 258.40** to **R6 200.00** reduced from June 2014 to December 2015 per

Grade D/E guards and from **R7 258.40** to **R6 634.00** reduced later in January 2016 to July 2017. The JV asserted that the Municipality undertook to retrospectively rectify the rates in respect of the remuneration of the JV but failed. The only witness of the Municipality denied that the Municipality had made an undertaking to revert to the original rates during the next cycle.

[7] The SLA having expired by the effluxion of time on 30 November 2016, the Municipality extended the agreement on a month to month basis, with a letter dated 1 December 2016, until a new service provider was appointed. On 3 July 2017 the Municipality advised the JV that the month to month agreement would terminate on 7 July 2017.

SPECIAL PLEA – PRESCRIPTION

[8] The Municipality has raised the abovementioned special plea, which may be dispositive of this whole matter. In consequence, it has become the sole issue making it practical to attend to it before considering the merits. The Municipality has pleaded the special plea as follows:

> "1 *The alleged debt sued for by the plaintiffs became due and payable on 14 March 2014 when the alleged cause of action being repudiation is alleged to have occurred.*
>
> 2. *The debt is one that prescribes after a period of three years in terms of section 11(d) of the Prescription Act, 68 of 1969.*
>
> 3. *Summons was served on the defendant on 20 January 2018, which is more than three years after the date on which the debt became due.*
>
> 4. *In the premises, the debt sought to be claimed by the plaintiffs is prescribed in terms of section 11 of the Prescription Act."*

ASSERTIONS OF THE PARTIES

[9] The special plea of prescription is based on the pleaded facts outlined above. The Municipality asserts that the cause of action or the repudiation occurred on 18 March 2014 when it unilaterally declared that the amounts would be revised in the manner outlined in the preceding paragraph. The claim for the difference was only instituted on 20 January 2018. The Action has, as such, prescribed because it was brought after the lapsing of a period of three years.

[10] On the contrary, the JV argues that the repudiation did not happen on 18 March 2014 but when the Municipality refused to make retrospective payment for the shortfall, which was when it gave notice to terminate the month-to-month arrangement, 3 July 2017. The Municipality having announced its intention not to pay retrospectively, as undertaken, the claim has not prescribed, maintains the JV.

LEGAL FRAMEWORK

[11] The special plea is based on Sections 11(d) and 12 of the Prescription Act, 68 of 1969. It will therefore be convenient and sensible to cite the pertinent parts of the sections. The Section provides:

> *"(a) …*
>
> *(b) …*
>
> *(c) …*
>
> *(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."*

[12] Section 12 is headed: "When prescription begins to run" and it provides:

> *"(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.*

(2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

[13] In *MEC for Health, Western Cape v M C*, the SCA held that the required knowledge extends to the minimum facts necessary to prove a claim and that a debt is due when it is owing and payable. The essentials of Section 12 have been a subject before various Courts in this country. Thus, the Constitutional Court in *Mtokonya v Minister of Police* held that the facts of which the creditor needed to be aware do not extend to the knowledge of the legal consequences but simply to those facts the creditor would need to prove his claim against the debtor.

[14] In the *MEC for Health: Western Cape* case *supra*, it was stated that in an application where a party raises a special plea of prescription two questions require examination. Firstly, the determination of the primary facts, on one hand, and the knowledge or deemed knowledge thereof, on the other. This means that once the facts from which the debt arose (the primary facts) have been determined, the enquiry turns to the creditor's knowledge of the primary facts. It is important to be cognisant of some overlap of facts between these two distinct enquiries postulated in Section 12(3) of the Prescription Act, 68 of 1969.

ANALYSIS

[15] It is common cause between the parties that the period of prescription for this claim falls under Section 11(d) of the Prescription Act, 68 of 1969, which I have cited *supra*. In other words, the period is three years. It then becomes important to identify the date on which prescription began to run in this matter. It is trite that prescription will begin to run

when a debt becomes due. On the facts of this case, it is the date on which the JV alleges the repudiation to have occurred. The date is 14 April 2014. Against that backdrop, the starting point should be repudiation.

[16] Repudiation happens when a party to an agreement, without any legal basis, advises the other to the agreement or acts in a manner that is reminiscent of a party who does not regard itself as still bound by the terms and conditions of the parties' agreement. The innocent party to the agreement has two options – it can either accept or reject the repudiation. If it accepts, it must cancel the agreement and claim damages. Conversely, if it rejects the repudiation, it can choose to sue for specific performance.[1]

[17] On the pleaded version of the JV therefore, it became conscious of the primary facts of the repudiation on 14 April 2014, what are these primary facts? These were that following the agreement to reduce the number of security guards to an overall number of 60 at the rate of **R7 858.40** per guard for 15 Grade C guards and **R7 258.40** per guard for 45 Grade D/E guards, the Municipality unilaterally went ahead and revised the rates from **R7 858.40** to **R6 500.00** per guard for Grade C and for the period June 2014 to December 2015 and **R6 955.00** per guard for the same Grade for the period January 2016 to July 2017.

[18] With regard to the Grade D/E, the Municipality reduced the amount of **R7 258.40** to **R6 200.00** per guard for the period June 2014 to December 2015 per guard. Finally, it reduced the amount of **R7 258.40** to **R6 634** per guard for the period January 2016 to July 2017. The Municipality proceeded to pay the JV in line with the revised amounts, which the JV claims, were unilaterally amended.

[19] On 18 March 2014, the Municipality, in no unambiguous conduct, acted like a party that did not regard itself as still bound by the terms, relating to the rates per Grade C Guard and Grade D/E guard laid down in the parties' agreement. This is when the cause of action based on repudiation arose and this much is alleged by the JV in its particulars

[1] *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) 835 (A) at 845

of claim. There is plethora of authority that prescription of a debt begins as soon as it is due. At the time when the repudiation occurred, the JV was aware that there would be a shortfall in the amounts that the Municipality intended to pay as the amount was clearly determinable. As such, claims 1 and 2 have undoubtedly prescribed.

[20] The conclusion of this Court on the issue of prescription marks the end of the road for the JV in respect of the first two claims. That said, it is important to state that even if this Court had dismissed the special plea of prescription, the claim for damages premised on repudiation is not sustainable having regard to the averments in the particulars of claim. The claim for these damages is premature insofar as the JV did not communicate its acceptance of the repudiation, a crucial step that would have brought the agreement to an end allowing it to proceed to claim for damages occasioned thereby.

CLAIM BASED ON THE MUNICIPALITY'S FAILURE TO GIVE NOTICE TO TERMINATE THE AGREEMENT

[21] Turning to the so-called extension of the agreement between the parties. The agreement provides for three ways in which the agreement can come to an end. These are the following:

21.1 By either party, for any reason, upon giving 30 (thirty) days' notice in writing;

21.2 By any other circumstance and/or clause provided for in the Agreement;

21.3 Automatically when the Agreement expired on the 30 November 2016.

[22] It is common cause that the duration of the agreement was thirty-six months commencing and terminating on 1 December 2013 and 30 November 2016 respectively. The agreement has, by the effluxion of time, come to an end on 30 November 2016. By a letter dated 1 December 2016, the Municipality appointed the JV to provide the same services contained in the previous agreement. This was not an extension or revival of the

agreement because the letter extending the services of the JV to the Municipality is specific - the new agreement was to run based on month to month.

[23] The above being the case, the Municipality was not under any obligation to give a thirty-day notice of its intention to terminate the agreement. This is obviously because the agreement that had such a provision had come to an end by the effluxion of time. The issue is therefore – if the agreement is not extant anymore, why would the Municipality be expected to adhere to the terms thereof? It being trite that a month-to-month agreement can be terminated at any stage by furnishing a reasonable notice, I am satisfied that the four-day period that the Municipality afforded the JV was fair. As such, the Municipality was within its rights to terminate the month-to-month agreement in the manner it did. There is thus no merit in Claim 3 of the JV against the Municipality.

[24] In the result, all three claims stand to be dismissed. I make the following order:

The claims are dismissed with costs, including those of two Counsel, where so employed.

[redacted]

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

Counsel for the Plaintiff: **Adv MR Maphutha**
Adv SJ Mavundla

Instructed by: **Masinga DS Attorneys**

Counsel for the Defendant: **Adv HM Mbatha**
Instructed by: **Mpho Mashiloane Attorneys**

Date of Judgment: **07 August 2024**